Filed 2/15/11 In re Jeremiah H. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JEREMIAH H. et al., Persons Coming Under the Juvenile Court Law.	B226176 (Los Angeles County Super. Ct. No. CK66522)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ROBERT H. et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County, Debra Losnick, Court Commissioner. Affirmed.

Suzanne M. Davidson, under appointment by the Court of Appeal, for Defendant and Appellant Robert H.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant Claudia C.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Claudia C. (Mother) and Robert H. (Father) appeal from the dependency court's order terminating their parental rights. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2006, Mother, who was 16 years old and a dependent of the juvenile court, gave birth to Jeremiah H. Jeremiah's father was not identified on the birth certificate, but his date of birth was listed as October 11, 1988. Jeremiah was given the same surname as Father, Mother's then current boyfriend. After Father was arrested in January 2007 for domestic violence against Mother, the Department of Children and Family Services (the Department) filed a petition pursuant to Welfare and Institutions Code section 300, subdivisions (a) and (b),[1] alleging that Jeremiah was at risk of physical and emotional abuse. Father was found to be Jeremiah's presumed father.

At the May 21 2007 jurisdiction and disposition hearing, Mother waived her presence and Father failed to appear. The court sustained the petition and ordered Jeremiah placed in the same foster home as Mother.

In August 2007, Mother gave birth to Randy. On Randy's birth certificate, no father's name was given, however, the father's birth date was listed as October 11, 1989. On September 10, 2007, the Department filed a petition on Randy's behalf, alleging that the parents had a history of domestic violence and Father had failed to provide Randy with the basic necessities of life.

On that same day, the court held a review hearing for Jeremiah and a detention hearing for Randy. The reports prepared for the hearings informed the court that Mother was in compliance with her case plan. Mother was residing in a group home with Jeremiah and Randy and providing good care to the children. She was attending counseling and parenting classes and completing random drug testing. Father, however,

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

had had no contact with the Department and was not present at the hearing. County counsel advised the court and the parties that the Department might recommend that the court deny Father reunification services as to Randy. The court questioned Mother with respect to Father and Randy's relationship. Based on Mother's statement that Father was not at the hospital when Randy was born and had not seen the boy, the court indicated it was likely to find that Father was an alleged father. Father was appointed counsel. The matter was continued and the Department was ordered to exercise due diligence to properly notify Father.

In November 2007, the court sustained the petition as to Randy. Father was not present. At his counsel's request, the matter was continued to January 15, 2008, for a contested review and disposition hearing as to Jeremiah and Randy, respectively.

At this juncture, as the parents have raised different issues on appeal, we will set forth the relevant facts as we address their contentions.

DISCUSSION

I. Mother's Appeal

As we have noted, for a time, Mother was in compliance with her case plan. However, after her juvenile dependency case was terminated in April 2008, things changed. She moved into transitional housing, but abruptly left a few days later without informing the social worker. The next day, Mother contacted the social worker and said she left because she did not like attending the group meetings and she wanted to live closer to her boyfriend in Riverside. Over the next two months, Mother and the children moved to several locations. The Department recommended that the court retain jurisdiction over the children. Mother contested the recommendation, however, the court ordered continued jurisdiction at a September 2008 hearing.

On September 26, 2008, the social worker made an unannounced visit to the maternal grandmother's home where Mother and the children were residing. The

maternal grandmother stated that on the previous day, Mother attacked her with a knife, resulting in Mother's arrest.

On September 30, after her release from custody, Mother attended a team decision meeting to address placement of the children. It was revealed that on September 25 Mother had brandished two knives and had threatened the maternal grandmother in the presence of the children. It was also disclosed that Mother had: (1) threatened to take her life and the lives of the children; (2) left the children unattended in a bathtub; (3) smoked marijuana in the children's presence; (4) shoved the children in the presence of others; and (5) visited Father with the children in violation of the court's order. According to the social worker, "[d]uring the meeting, mother's behavior was irrational and out of control. She yelled and screamed and used profanities."

In October 2008, the Department filed a section 342 petition based on the above incidents. The petition was sustained in November. As a result of the altercation with the maternal grandmother, Mother was convicted of battery and placed on probation.

In December 2008, Mother and Father were involved in several incidents of domestic violence. On one occasion, he slapped Mother and, a few days later, he broke into her home, pulled off the window screens, and dragged her out of the home. The police were called and Father fled, breaking car windows along the way. Eventually, Father was arrested.

In April 2009, the social worker reported that Mother was not in compliance with her case plan and was now six months pregnant with her third child, Abraham.[2] She attended only a few sessions of counseling and parenting classes, failed to enroll in an anger management program, and did not drug test. The social worker also reported that during the period from December 2008 to February 2009, Mother was late for virtually every visit, engaged in inappropriate behavior by bringing friends to visits, which was not

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[2] Abraham is not a subject of this appeal. We use the term "children" to refer only to Jeremiah and Randy.

allowed, and caused the children to become agitated. Mother missed two visits in March 2009 and one in April 2009. The children were reportedly thriving in their foster home.

On June 1, 2009, Mother's reunification services were terminated. The matter was set for a September 29, 2009 section 366.26 hearing.

In September 2009, the social worker reported that Mother's visits from June 2009 to August 2009 were consistent and their quality was improving. Nonetheless, the social worker believed the children did not appear to be bonded with Mother and did not recognize her as their primary maternal figure. "Rather, they respond to her as a person they are familiar with."

In contrast, the foster parents "continued to provide the children with the basic necessities of life . . . . Further, they provide the children with a nurturing and loving environment that is conducive to the well-being of the children. [The Department] has noted that the children respond to the prospective adoptive parents and appear to be bonded and attached to the parents."

In October 2009, Mother filed a section 388 petition seeking return of the children to her care and additional family maintenance services. She alleged that she had "fully complied with the court's orders."

In the December 2009 report, the social worker wrote that Mother "has not continued to fully comply with the court orders and the case plan since the minor Abraham was released to her on 8/24/09. She has not continued to attend individual counseling and she has failed to provide DCFS with proof of attendance in a domestic violence support group. Given mother's recent victimization by the minors' father in December 2008, domestic violence counseling remains vital to mother's ability to stay away from the father and lead a life free of violence. Furthermore, mother missed drug tests on 9/10/09 and on 10/7/09."

The social worker interviewed the person who monitored Mother's visits with the children at the foster family agency. The monitor stated, "I have never heard Jeremiah say that he wants [Mother] to come to his home." Although he had seen Jeremiah become upset after visits, it was "only because he wants to play more, not because he has

a sense of loss." It appeared that the maternal aunt, who accompanied Mother on the visits, spent more time playing with the children. The monitor also expressed concerns about Mother's "inability to set appropriate boundaries" for the children, especially Jeremiah. Notwithstanding these shortcomings, the social worker thought there was no question that Mother cared deeply for her children.

In a March 2010 report, the social worker indicated that Mother had missed two visits in December 2009 and two visits in February 2010. She was a virtual no-show for January 2010, making only one visit. The social worker observed that initially the children were upset when visits were cancelled, but now they did "not appear to have any significant attachment to their biological mother." She believed the children "would not be emotionally disturbed if their future contact with the Mother were to be severed."

In a report prepared for the April 2010 hearing on the section 388 petition, the social worker wrote that Mother visited four times in March 2010, three times in April 2010, and cancelled one visit in April. The children were aggressive with Mother during some visits and unresponsive during others.

At the section 388 hearing, the social worker testified that Mother never requested an increase in visitation and had completed some but not all components of her case plan. His recommendation was to deny the petition. Mother testified that she visited consistently and the children did not want to leave the visits. She claimed that the foster mother would not answer her calls, thwarting Mother's effort to have telephonic contact with the children.

The hearing was continued until June 7, 2010. After the court denied Mother's section 388 petition, it conducted the section 366.26 hearing. Mother testified that Randy and Jeremiah were bonded to her and their half-sibling, Abraham. The foster family agency worker who monitored the visits testified that the children had "some attachment" to Mother. He said that he went to the foster family's home every other week and observed that the children had a "very strong bond" with their foster parents.

The court observed that Mother and the children had a "small" emotional attachment, not a strong bond. It concluded the benefit of adoption outweighed the detriment of severing the parent-child relationship and terminated parental rights.

Mother contends the court should have determined that the contact and benefit exception under section 366.26, subdivision (c)(1)(B)(i) applied because she regularly visited the children and had a significant and positive relationship with them.

Pursuant to section 366.26, subdivision (c)(1), once the juvenile court determines a child is adoptable, the court shall terminate parental rights and order the child placed for adoption unless the court finds a compelling reason for determining that termination would be detrimental to the child due to certain circumstances. One such circumstance is where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

It is the parent's burden to show that termination would be detrimental. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) "To meet the burden of proof for the section 366.26, subdivision (c)(1)[(B)(i)] exception, the parent must show more than frequent and loving contact or pleasant visits. [Citation.] . . . The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. [Citations.]" (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953-954.)

To justify application of section 366.26, subdivision (c)(1)(B)(i), any relationship between the parent and child must be sufficiently significant that the child would suffer detriment from its termination. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.) The juvenile court must consider many variables, including the child's age, the length of time the child was in parental custody and in foster care, and the effect of interaction between parent and child, and the child's particular needs. (*Id.* at p. 467; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 810-811.) The court must then balance the strength and quality of the parent-child relationship against the security and sense of belonging that a stable family would confer on a child. (*In re Zachary G.*, *supra*, at p. 811.) "If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we

uphold those findings." (*In re Megan S.* (2002) 104 Cal.App.4th 247, 250.) The appellant has the burden of showing that the juvenile court's order is not supported by substantial evidence. (*Id*. at p. 251.)

Mother failed to meet the first prong of the exception, regular visitation. Although she managed to visit the children in the two months leading up to the section 366.26 hearing, her attendance prior to that time was sporadic. In December 2009, January 2010, and February 2010, Mother had a total of five visits.

In addition, the evidence did not establish that there was a beneficial parent-child relationship sufficient to provide an exception to adoption. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The parental relationship is demonstrated by "the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The court observed that Mother did not progress beyond monitored visitation. Mother was not the person to whom the children looked to provide for them. That role was filled by the prospective adoptive parents. More importantly, while the children did not seem to have any significant emotional attachment to Mother, they had developed a strong bond with the prospective adoptive parents. There was substantial evidence to support the juvenile court's decision to terminate Mother's parental rights.

II. Father's Appeal

In January 2008, Father spoke with paternal grandmother and left a message for the social worker but did not leave a telephone number or an address on either occasion. At the contested hearing on January 15, 2008, Father's counsel was present but Father was not. Reunification services as to Jeremiah were terminated and denied as to Randy.

As of July 2008, Father had not communicated with the Department. Mother denied reports that she had been in contact with him and claimed the children had not seen him.

In September 2008, Father's counsel told the court she had not had recent contact with Father. Despite several letters and phone calls, counsel had not spoken to Father in a year. The social worker reported that Father had not participated in the case plan.

Father was first interviewed by the Department on October 20, 2008. He told the social worker that he returned to the country from Tijuana in September and had contact with the children. On October 20, Father appeared for a supervised visit. When the social worker heard Father asking the children if they wanted "to come home with Daddy and Grandma," she told Father that he should not ask that question. Father became very upset and abruptly left the visit without saying goodbye to the children. He later told the social worker that he would not visit the children again.

Father made his initial court appearance at the November 3, 2008 pretrial conference related to the section 342 petition the Department filed. Father was reminded that his reunification services with Jeremiah had been terminated and he had been offered no services as to Randy. The court ordered Father to return for the November 17 hearing and advised him that if he did not return, the hearing would proceed without him.

At a hearing on July 21, 2009, Father's paternity status as to Randy was addressed. Mother was present and informed the court that Father was currently incarcerated. She confirmed that Randy was Father's biological child. Mother stated that Father visited Randy, told others he was Randy's father, and gave paternal grandmother money for Randy's care. The court stated that its tentative ruling was to find Father to be Randy's presumed father and continued the matter to August 3, 2009.

At the August 2009 paternity hearing, Father was present. Father's counsel requested presumed father status as to Randy. Counsel for the children opposed Father achieving presumed father status, arguing that his whereabouts were unknown for the first year of Randy's life and that Randy had never lived in Father's home. The court stated, "I think [counsel for the children] is correct. I don't know there has been the requisite finding that would allow the court even to make a presumed father finding. So the court is going to leave it as an alleged father finding."

The section 366.26 hearing was called on September 29, 2009. Father was not present, although he had received proper notice. Mother's counsel requested a contested hearing, which was set for December 1. Father appeared at the December 1 hearing, which was continued again to March 8, 2010. Father was ordered to appear.

At the March 8 hearing, Father again was incarcerated and not present. The court continued the case and ordered Father to be transported to the April 27, 2010 hearing.

At the April 27, 2010 hearing, Father was not present and counsel presented a signed prisoner's waiver of appearance form from Father for that hearing.[3] The court heard testimony and continued the hearing until May 17, 2010. It ordered Father to be transported for that hearing.

On May 17, due to the absence of Mother's counsel, the court continued the matter to June 7 and issued a removal order for Father. Father was not present at the May hearing and the record contains a prisoner's waiver of appearance form with the typewritten date of May 17, 2010, and Father's name and signature. An additional form contains the court date of May 17, 2010, Father's typewritten name, and a signature dated May 13, 2010.

At the June 7, 2010 hearing, Father's counsel questioned the validity of the signature on the waiver of appearance form.[4] She stated that the signature on the waiver form was different from the signature on letters Father had written to her in the past. Mother's counsel said Father had told maternal grandmother that he wanted to be present. Father's counsel requested a continuance of the hearing. The court stated, "Except I have two signed waivers from him . . . . [T]he Department certainly made sure and gave the

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[3] The form has the typewritten day of the hearing as April 27, 2010. At the top of the form is the handwritten notation, "Waived 4-23-10." The form has a box checked which states, "I authorize my attorney of record to represent me at the hearing" and contains Father's typewritten name, but no signature.

[4] It is not clear from the record which waiver form counsel was referring to.

father the opportunity to be here and transported. He signed both. He does not wish to be here for this hearing. I am respectfully denying the request to continue."

Father contends he was denied due process because he did not receive notice and the proper form from the clerk so that he could contest his alleged father status as to Randy. He also asserts the court erred by proceeding with the section 366.26 hearing on June 7, 2010, in his absence and by denying his request for a continuance.

A. Notice of Alleged Father Status

In dependency law, there are three types of fathers: presumed, alleged, and biological. "A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an 'alleged' father." (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) Alleged fathers do not have as many rights in dependency proceedings as biological and presumed fathers; for example, they do not have the right to appointed counsel or reunification services. (*In re O. S.* (2002) 102 Cal.App.4th 1402, 1406.)

Section 316.2, subdivision (b) provides that when a man is identified as an alleged father, he shall be given notice that he is or could be the father of the child, and that proceedings under section 300 could result in termination of his parental rights and adoption of the child. The notice must include Judicial Council form JV-505 advising the alleged father that he can have a trial on the issue of parentage, and that if he desires such a trial, he should complete a form JV-505.

California Rules of Court, rule 5.635 provides that the juvenile court has a duty to attempt to determine parentage of a dependent child. The court must inquire of the child's parent and any appropriate persons about the identity of presumed and alleged parents at the initial hearing and at all subsequent hearings until parentage has been established. If a man executes and files a declaration pursuant to Family Code section 7570 et seq., he is presumed to be the father of the child. If the local child support agency states, or if the court determines from the parties or other evidence, that there has been no prior determination of parentage, the juvenile court must make form JV-505

available in the courtroom for the alleged father and his counsel to complete. If after the court has learned through inquiry or other information that someone is an "alleged" parent, "the clerk must provide to each named alleged parent, at the last known address, by certified mail, return receipt requested, a copy of the petition, notice of the next scheduled hearing, and [form JV-505] unless [¶] (1) The petition has been dismissed; [¶] (2) Dependency or wardship has been terminated; [¶] (3) The parent has previously filed a form JV-505 denying parentage or waiving further notice; or [¶] (4) The parent has relinquished custody of the child." (Cal. Rules of Court, rule 5.635(g).)

There is no dispute that Father did not receive notice pursuant to section 316.2 and the clerk did not send Father or counsel a form JV-505. It is also clear that Father and counsel did not complete the form.

The court's failure to provide notice pursuant to section 316.2 and rule 5.635 is subject to harmless error analysis. (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1122.) We will not set aside the dependency court's order, unless, after an examination of the case we are of the opinion that the error resulted in a miscarriage of justice. (*Ibid.*) Utilizing that standard, we conclude the failure to provide statutory notice to Father was harmless.

The purpose of the notice at issue is to advise an alleged father that he has an opportunity to appear and change his paternity status. (See *In re O. S.*, *supra*, 102 Cal.App.4th at p. 1408 ["notice provides [the father] an opportunity to appear and assert a position and attempt to change his paternity status"].) Here, Father had that opportunity. The court held a special hearing to determine Father's status as to Randy on August 3, 2009. At that hearing, Father was present. He had counsel and an opportunity to be heard. The children's attorney objected to Father being deemed Randy's presumed father due to his failure to have contact with Randy for the first year of the child's life. Father had the option of refuting that argument by presenting evidence that he had received

Randy in his home and had held him out as his natural child.[5] He declined to do so. His counsel argued that Father had visited the children and that the paternal grandmother and other family members had provided monetary support for Randy when Father was unable to. The court deemed that showing inadequate and found Father to be an alleged father.

Father's claim that the court should have provided him with notice pursuant to section 316.2 and rule 5.635 after it had deemed him to be an alleged father is unavailing. Father had the hearing that notice is designed to provide. More to the point, he does not explain why post-hearing notice would have made a difference. He asserts notice would have allowed him to make the requisite showing to attain presumed father status. However, he fails to point to any evidence that he did not have at his disposal at the August 3 hearing.

We are satisfied that the notice deficiency did not affect the outcome of the proceedings or result in a miscarriage of justice.

B. Father's Waiver of Appearance

Penal Code section 2625, subdivision (b) provides that when a proceeding is brought under section 366.26 to terminate the parental rights of a prisoner, the court "shall order notice of any court proceeding regarding the proceeding transmitted to the prisoner." Under subdivision (d) of that section, when the court receives a statement from the prisoner or his attorney that the prisoner wishes to be present, "the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. No proceeding may be held under . . . Section 366.26 . . . without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the

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[5] As Father was not married to Randy's mother and there is no evidence that he attempted to marry her, Father could achieve presumed father status if he received Randy into his home and openly held him out as his natural child. (Fam. Code, § 7611.)

prisoner . . . or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding."

Father contends the court erred by relying on the signed waivers for the April 27 and May 17 hearings and concluding that he intended to waive his appearance at the June 7 hearing. He argues the court should have continued the matter to determine the waiver issue because, in addition to counsel's question as to the authenticity of the signature on the waiver form, there was evidence Father wanted to be present. We need not resolve the dispute. Assuming the court should have declined to press forward with the June 7 hearing in Father's absence, any error is subject to harmless error analysis (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624-625), and we conclude Father suffered no prejudice.

Father does not attempt to demonstrate how the outcome of the section 366.26 hearing would have been altered by his presence. He merely incorrectly argues that because he was not present at the June 7 hearing, the court's order must be reversed. Father's silence on the issue of prejudice speaks volumes. An examination of the record demonstrates there is no evidence establishing either that the children were not adoptable or that any of the statutory exceptions to adoption applied to Father. We will not disturb the court's order.

DISPOSITION

The dependency court's order terminating Mother's and Father's parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J. MANELLA, J.